IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH STONELAKE,	:	**CIVIL ACTION**
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
HOST MARRIOT CORPORATION, et al.,	:	
	:	
Defendants.	:	**NO. 95-7211**

M E M O R A N D U M

Reed, J. **October 26, 1998**

Plaintiff Joseph Stonelake ("Stonelake") has brought this action against defendants Host Marriott Corporation and Marriott International, Inc. alleging that defendants failed to keep promises to him that they would protect him from retaliation if plaintiff cooperated with investigations of allegedly corrupt employees of defendants. Plaintiff asserts that the actions of defendants constituted breach of contract and fraud. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1332 as the parties are of diverse citizenship and the amount in controversy is in excess of $50,000.00, exclusive of interest and costs.[1]

Presently before the Court is a motion for summary judgment brought by defendants (Document No. 53), and the response of plaintiff thereto. For the reasons that follow, the motion will be granted in part and denied in part.

[1]Plaintiffs filed their complaint on November 11, 1995 in the United States District Court for the Eastern District of Pennsylvania. I note that this lawsuit was commenced before the jurisdictional amount in controversy requirement under 28 U.S.C. § 1331 increased to $75,000.00. See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (enacted October 19, 1996, and effective January 17, 1997).

I. BACKGROUND

The following facts are based on the evidence of record viewed in the light most favorable to plaintiff Joseph Stonelake, the nonmoving party, as required when considering a motion for summary judgment. See Carnegie Mellon Univ. v. Schwartz, 105 F.3d 863, 865 (3d Cir. 1997).

During the 1980's and the early part of the 1990's, plaintiff did construction work exclusively for Marriott Corporation, which was the predecessor to one or both defendants, Host Marriott Corporation and Marriott International, Inc. (for purposes of this memorandum, all three entities will be referred to collectively as "Marriott"). Plaintiff did his construction work either in his own name or through a general contracting construction company named JMS & Associates, Inc. ("JMS") to which he is the successor-in-interest. From 1987-1990, JMS was regularly hired, through Marriott's construction bidding process, to work on Marriott construction/renovation projects. Indeed, in 1988 gross sales of JMS were $866,243, in 1989 gross sales were $2,159,626 and in 1990 gross sales were $2,119,194. (Stonelake Dep. at 209-212.)

The bidding process at Marriott involves two stages: inviting contractors to bid and selecting a contractor from those invited to bid. In answer to plaintiff's first set of interrogatories, Marriott described the selection process as follows:

> There are many factors which relate to the selection of qualified contractors for any given construction or renovation job. For instance, Marriott will not do business with any contractor who has not been designated as a "Qualified" bidder or contractor. . . .
>
> For each project, the Project Manager selects approximately six contractors to receive an invitation to bid. Contractors are selected based upon their past job performance, their geographic proximity to the job site, financial capability for the size of the job, ability to select and retain necessary sub-

> contractors, prior experience with similar projects and overall performance factors.

(Def. Ans. to Plt's First Set of Interrogatories, Ques. 16). After the contractors who have been invited to bid submit their bids, Marriott reviews the bids and generally chooses the lowest bidder. In its brief, Marriott stressed that the compilation of the invite-to-bid list is essential to the process and acknowledged that the process is "based upon the discretion of an assigned Project Manager" who prepares the invite-to-bid list based upon subjective factors (Def. Brief at 9).

In 1991, plaintiff learned that an anonymous letter had been sent to Marriott connecting him with charges of illegal conduct against Robert Bagley, a Construction Manager in the Marriott Architecture and Construction Division ("A&C Division"). Prior to this, plaintiff had assisted an internal Marriott probe, investigating illegal kick-backs and pay-offs involving falsely inflated bills and direct cash payments (the "1987 investigation").[2] Plaintiff again offered to cooperate with any investigation that Marriott chose to conduct, but only in exchange for

[2]Upon learning of the 1991 letter, plaintiff contacted the internal auditing department of Marriott only to learn that this department had no record of the 1987 investigation. In 1987, as a result of plaintiff's complaints, Marriott commenced an investigation. In the course of its investigation, Marriott, through two outside investigators, Edward L. DuBois, III and Bobby Grove, promised plaintiff that he would not suffer any adverse repercussions for cooperating with and participating in the investigation. The written documents provided to plaintiff confirming this agreement were addressed to Marriott employees, however, plaintiff was assured by DuBois and Grove that these documents also applied to him. While DuBois and Grove represented to plaintiff that Marriott intended to conduct a thorough investigation of his complaints and remedy any wrongdoing, plaintiff has alleged that the actual goal of their activities was to determine the extent of plaintiff's knowledge and evidence, not to take any corrective or curative action. In fact, no remedial actions were taken by Marriott as a result of this investigation, and no disciplinary action was taken against any Marriott employees. Apparently, various executives within Marriott and specifically within the A&C Division were kept informed of the progress of the investigation and of the fact that no adverse actions were going to be taken against any Marriott employees.

assurances that he would suffer no adverse repercussions[3]; Marriott agreed to give such assurances and memorialized its agreement with plaintiff in a November 15, 1991 letter from Carlton J. Trosclair, Associate General Counsel, to plaintiff.[4] In addition, Jeff Brindle, then senior director of internal auditing for Marriott, gave plaintiff numerous assurances that Marriott was conducting a thorough investigation.

During a meeting in September, 1991, plaintiff informed Marriott that JMS had submitted the lowest bid on a project for a Marriott Harbor Beach property, but had not been awarded the contract.[5] The investigators determined that the Project Manager awarded the project to another contractor even though JMS should have been awarded the contract as the lowest bidder. As a result of the investigation a Marriott employee was terminated and the project was awarded to

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[3]Plaintiff alleged that he suffered retaliation as a result of his cooperation in the 1987 investigation and that Marriott breached its promise to protect him from such retaliation. His claims arising from the 1987 investigation, however, were found by this Court to be barred by the Statute of Limitations. (Doc. No. 17).

[4]The letter states that Marriott understands Mr. Stonelake's concern with respect to being "black-balled." The letter, therefore, promises that

> "in return for complete, truthful, objective information concerning improper or illegal business practices relating to Marriott Corporation and its operations, Marriott Corporation will:
>
> > a) defend you against any civil suits brought by any individual or company that are directly attributable to your cooperation with and provision of information to Marriott Corporation in an investigation into illegal and improper business activities, and
> >
> > b) insure that you will be afforded a fair, equitable opportunity to bid for Marriott construction projects on the same basis as all other contractors and will insure that your cooperation on any investigation will not adversely affect you or your company during the contractor selection process on any project on which you may submit a bid."

Letter of Nov. 15, 1991 at 1-2. At the bottom of the letter, after the "agreed to and accepted" signature line is a handwritten notation which says "Note: as per our original conversation." Id.

[5]Plaintiff met with investigators, Jeff Brindle, Carlton Trosclair and others, on September 7, 1991 to discuss his participation in the investigation. (7/10/97 Stonelake Dep. at 78). During that meeting, plaintiff asserts that investigators made the following verbal promises: (1) to examine the downsizing of his friend, James Elliot, and correct that downsizing if it was wrong; (2) to terminate and "houseclean" individuals implicated in the investigation; and (3) to examine the treatment of JMS in the past and to correct any wrongs which occurred against JMS in the selection process. (7/11/97 Stonelake Dep. at 238-40).

JMS. Subsequently, JMS was awarded three more related contracts at the Harbor Beach property during the Spring/Summer of 1992. The amount of the Harbor Beach project bid was approximately $250,000.00. The value of the subsequent Harbor Beach projects (renovating a second ballroom, renovating ocean decks and renovating a cafeteria) was estimated by Marriott as being somewhere between $108,000.00 and $292,000.00. (Def. Brief at 8).

Although JMS was awarded the Harbor Beach projects, these projects were not bid through the A&C Division but were bid directly and independently through the hotel. (3/3/98 Stonelake Dep. at 28-30). After 1991, plaintiff was invited to submit bids on the following projects: Crystal City Marriott, Tampa Westshore/Airport Marriott and Chicago O'Hare Marriott. (Def. Brief at 10-11).[6] Marriott has submitted the affidavits of Project Managers stating that plaintiff was not the lowest bidder on the Tampa Airport/Tampa West Shore and Chicago O'Hare Marriott projects. (Aff. of James Goebels at ¶ 6; Aff. of Robert Simonson at ¶ 10). Marriott is silent as to whether plaintiff was or was not the low bidder on the Crystal City Marriott project. (See id.; Def. Brief at 10-11). In addition, the Tampa West project was awarded to an unlicensed contractor. (Aff. of James Goebels at ¶ 7). It was only after plaintiff complained that the unlicensed contractor was made to affiliate itself with a licenced contractor to complete the job. (Id.) Thus, after 1991, plaintiff was not awarded a single contract originating in the A&C Division. (Def. Brief at 10-11).

In early 1993, plaintiff notified the legal department of Marriott of the treatment he was receiving in violation of his previous agreements with Marriott, but he was informed that they

[6] Although Marriott characterizes the Tampa Westshore and Tampa Airport projects as separate and distinct, in fact the Tampa Westshore and Tampa Airport projects were bid as one project. (Aff. of James Goebels at ¶¶ 4, 6). Plaintiff contends he was only invited to bid on two A&C projects. See Plt. Brief at unnumbered 22).

were unaware of any such agreements. (Letter dated March 8, 1993). They also informed him that, because he was now threatening legal action against Marriott, Marriott would no longer conduct business with him or JMS. (Id.) That same year JMS went out of business. (Stonelake Dep. at 30). Plaintiff filed suit against Marriott on November 15, 1995.

II. LEGAL STANDARD

Defendants have moved pursuant to Federal Rule of Civil Procedure 56 for summary judgment. Under Federal Rule of Civil Procedure 56(c), summary judgment may be granted when, "after considering the record evidence in the light most favorable to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Turner v. Schering-Plough Corp., 901 F.2d 335, 340 (3d Cir. 1990). For a dispute to be "genuine," the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party may not rely merely upon bare assertions, conclusory allegations, or suspicions. Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982).

III. DISCUSSION[7]

As a threshold matter, it must be determined if an enforceable contract exists between plaintiff and Marriott. Acume Constr., Inc. v. Neher, 616 So. 2d 98, 99 (Fla. Dist. Ct. App. 1993) (existence of a valid contract is a threshold question of law for the trial court). Plaintiff contends that the November 15, 1991 letter made promises which Marriott subsequently breached. Marriott argues that there never was an enforceable contract. Marriott contends that the November 15, 1991 letter was transformed into a counter offer by the notation added by plaintiff at the bottom of the letter and that Marriott never accepted plaintiff's counter offer.

It is a generally recognized principle that an acceptance of an offer, to result in a contract, must be absolute and unconditional. Sullivan v. Economic Research Properties, 455 So. 2d 630, 631 (Fla. Dist. Ct. App. 1984). Indeed, it is fundamental that in order for a contract to be binding and enforceable, there must be a meeting of the minds on all essential terms and obligations of the contract. Browning v. Payton, 918 F.2d 1516, 1521 (11th Cir. 1990). Accordingly, if an offeree adds a conditional term to the original offer, it is treated as a rejection of the offer and as a counter offer. Florida Towing Corp. v. Olson, 426 F.2d 896, 900 (5th Cir. 1970). In addition, when a contract is unambiguous, the court may properly interpret the terms of the contract. Mariner Cay Property Owners Ass'n, Inc. v. Topside Marina, Inc., 714 So. 2d 1130, 1131 (Fla. Dist. Ct. App. 1998). If, however, the terms are ambiguous or unclear, then the interpretation of the contract term is properly one for the finder of fact. Hoffman v. Terry, 397 So. 2d 1184, 1184 (Fla. Dist. Ct. App. 1981).

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[7] Applying Pennsylvania's choice of law rules, the parties correctly agree that Florida law applies to the claims of plaintiff. See Memorandum and Order dated July 31, 1996 in which this Court analyzed the choice of law question (Doc. No. 17).

Here, the notation at the bottom of the November 15, 1991 letter is neither ambiguous nor conditional. As read within the four corners of the contract, the notation is at most surplusage. Given the context of the letter, the notation can only be read as an affirmation that the foregoing letter is consistent with any prior conversations. There is no indication on the face of the letter that the plaintiff intended to include a conditional term. Thus, as to the typewritten terms of the November 15, 1991 letter, I find that the parties had a binding agreement.

Plaintiff argues that the notation is an additional term which does not invalidate his acceptance[8] and should operate to include the following oral promises made by Marriott prior to the execution of the letter of November 15, 1991: (1) to examine the downsizing of his friend, James Elliot, and correct that downsizing if it was wrong; (2) to terminate and "houseclean" individuals implicated in the investigation; and (3) to examine the treatment of JMS in the past and to correct any wrongs which occurred against JMS in the selection process. (7/11/97 Stonelake Dep. at 238-40). Indeed, plaintiff asserts that both Mr. Brindle and Mr. Trosclair were aware of the intended addition and told him to "write on it whatever I wanted, just to sign it and send it . . . ." (7/11/97 Stonelake Dep. at 259). With respect to the written agreement between Marriott and Mr. Stonelake, however, the parol evidence rule prohibits the use of extrinsic evidence to interpret the notation as argued by plaintiff.

Under the law of Florida, the parol evidence rule bars the consideration of extrinsic evidence to explain or vary the express terms of a contract unless the contract contains an ambiguity on its face. J.C. Penny Co., Inc. v. Koff, 345 So. 2d 732, 735 (Fla. Dist. Ct. App.

[8]Plaintiff cites Restatement (Second) of Contracts § 61 for the proposition that "an acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms."

1977). Accordingly, courts are allowed to consider extrinsic evidence only when confronting an ambiguous contract provision, and they are barred from using evidence to create an ambiguity to rewrite a contractual provision or vary a party's obligations under a contract. Id. Here, the contract does not lack clarity or contain ambiguous provisions. In addition, the agreement contains all essential terms. Thus, plaintiff's deposition testimony cannot serve to add to or change the terms agreed to in November 15, 1991 letter.[9]

Moreover, even if plaintiff intended the notation to be request for additional terms and assuming Marriott understood it to be a request for additional terms, there is no evidence that Marriott ever accepted any of those additional terms. On the contrary, in his affidavit, Carlton Trosclair states that the only promises that Marriott intended to make are those embodied in the text of the letter. (5/6/98 Aff. of Trosclair at ¶¶ 4-6). Plaintiff has no evidence that, once Marriott received the letter, it accepted plaintiff's proposed additional terms.

Plaintiff's argument that Marriott "ratified the modified contract by its conduct" is not supported by the record. Plaintiff contends that Marriott:

> (a) continued to solicit Mr. Stonelake's involvement, advice, assistance in the investigation; (b) intervened on Mr. Stonelake's behalf to investigate the selection of a competing contractor on the Harbor Beach project and awarded Mr. Stonelake the project after discovering fraud in the project manager's selection of the competing contractor; (c) continued dialogue with Mr. Stonelake for up-dated

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[9]This does not bar plaintiff from producing evidence of similar oral promises made by Marriott after the execution of the November 15, 1991 letter. See Plt. Brief at unnumbered 18. The existence of such oral contracts, however is a question for the jury. Welborn v. Kemp, 141 Fla. 89, 90 (1939).

In addition, under Florida law, a plaintiff may proceed with both a breach of contract action and a fraudulent inducement action in the same lawsuit arising from out of the same operative facts. Ashland Oil, Inc. v. Pichard, 269 So. 2d 714 (Fla. Dist. Ct. App. 1972). Accordingly, even though the representations are not actionable under a breach of contract action, they nonetheless continue as relevant and probative for consideration of whether Marriott fraudulently induced Mr. Stonelake to enter into the agreement and to cooperate with investigators and become an informant. Clearly the parol evidence rule is not applicable to the tort of fraudulently inducing a party to enter into a writing. Id. Moreover, the statute of limitations would not bar consideration of these representations for purposes of plaintiff's fraud claim. See Memorandum and Order dated July 31, 1996 (Doc. No. 17).

> information; [and] (d) communicated with Mr. Stonelake about bidding difficulties that he began to encounter.

(Plt. Brief at unnumbered 10). The only action by Marriott which could be construed as ratifying any additional terms identified by plaintiff is the intervention by Marriott on behalf of JMS in the Harbor Beach project.[10] However, this occurred *prior* to November 15, 1991. In this situation, the earlier action of Marriott cannot ratify the addition of terms to a subsequent contract. Thus, the evidence offered by Marriott is uncontroverted that even if the notation could be construed as a request for an additional term or modification, Marriott never accepted any such additional terms.[11] Accordingly, summary judgment will be granted to the extent that plaintiff asserts contract claims arising from handwritten "note" appended the November 15, 1991 letter and based upon oral representations made prior to the date of the letter.

Summary judgment will not be granted, however, on the remaining claims because Marriott has failed to establish the absence of any issue of material fact. Mecier v. Broadfoot, 584 So. 2d 159, 160-61 (Fla. Dist. Ct. App. 1991). Although Marriott disputes the existence of an enforceable contract, it argues in the alternative that Marriott nevertheless discharged its contractual obligations. Marriott contends that the November 15, 1991 letter "promised only that if he were invited to bid that he would be treated fairly" and not that plaintiff be given preferential treatment. (Def. Brief at 20). Marriott's contention, however, misses the mark. The contract clearly promises that plaintiff be given a "fair, equitable opportunity to bid," *and* that his cooperation will not adversely affect him or his company in the selection process. See Letter of

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[10]The other conduct that plaintiff cites is totally consistent with the provisions set forth in the body of the letter. See Letter of Nov. 15, 1991.

[11]Accordingly, the Court need not address the arguments of defendants that any additional terms also would be time barred.

November 15, 1991. The deposition of plaintiff raises sufficient factual doubt as to whether Marriott breached its contract with Mr. Stonelake as embodied in the November 15, 1991 letter.

There is sufficient evidence in the record that plaintiff was in fact "black-balled" and excluded from the bidding process that a reasonable jury could find that Marriott breached its promise to plaintiff. For example, between 1990 and 1993, there was a dramatic decline in the amount of business JMS did for Marriott. (7/11/97 Stonelake Dep. at 209-212; 7/10/97 Stonelake Dep. at 30). Indeed, the record shows that JMS was only selected to bid for two projects originating in the A&C Division. (Aff. of Project Manager James Goebels at ¶ 6; Aff. of Project Manager Simonson at ¶ 4). After a successful history of bidding for Marriott contracts, plaintiff was not awarded a single contract after completing Harbor Beach and related projects. (See 7/11/97 Stonelake Dep. at 209-212; Def. Brief at 2, 10-11).

Marriott claims that the limited number of invitations to bid on projects is simply a reflection of bad economic times. It is uncontested, however, that Project Managers have a great deal of discretion in compiling the invite-to-bid list. Moreover, there is evidence in the record that Project Managers characterized plaintiff as a "snitch," "whistle-blower," and as someone who needed to "learn by this." (7/10/97 Stonelake Dep. at 58-60; 7/11/97 Stonelake Dep. at 160-61. Indeed, Mr. Simonson, a Project Manager for Marriott, stated that he deliberately avoided working with Mr. Stonelake. (Simonson Dep. at 59).

Thus, Marriott has failed to establish that there is not a genuine issue of fact as to whether the reasons for the change in plaintiff's access to the bidding process were for retaliatory reasons or for purely business-related discretionary reasons. Moreover, given the circumstances surrounding the Tampa Westshore/Airport Marriott project (being awarded to an unlicensed

contractor) and, in the face of plaintiff's allegations, Marriott's silence with regard to the Crystal City project, there are factual questions regarding whether plaintiff was adversely affected in the selection process on the bids he did submit. Accordingly, this Court is precluded from granting summary judgment.

IV. CONCLUSION

Based upon the foregoing analysis, the motion will be denied granted in part and denied in part. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH STONELAKE,	:	**CIVIL ACTION**
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
HOST MARRIOT CORPORATION, et al.,	:	
	:	
Defendants.	:	**NO. 95-7211**

O R D E R

AND NOW this 26th day of October, 1998, upon consideration of the motion by defendants for summary judgment (Doc. No. 53), the response of plaintiff thereto, as well as the reply of defendants and the sur-reply of plaintiff, for the reasons stated in the foregoing memorandum, it is hereby **ORDERED** that the motion is **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED that the motion is **GRANTED** with respect to breach of contract claims arising from the handwritten "note" appended to the letter dated November 15, 1991 and based upon oral representations made prior to the date of the letter.

IT IS FURTHER ORDERED that the motion is **DENIED** in all other respects.

IT IS FURTHER ORDERED that the parties shall submit a joint report to the Court no later than November 23, 1998 as to the status of settlement. If the parties need the assistance of the Court in facilitating settlement negotiations, the report shall so indicate. By said date, plaintiff shall contact the Deputy Clerk to arrange a date for a final scheduling conference.

LOWELL A. REED, JR., J.